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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1972

~~72-1079~~

SEYMOUR ROSENFIELD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No.

SEYMOUR ROSENFIELD, Petitioner

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

An opinion was rendered by the Court of Appeals for the Third Circuit in this case (Appendix A).

JURISDICTION

The judgment of the Court of Appeals was entered on November 6, 1972 (Appendix B). A timely motion for rehearing was denied on December 4, 1972 (Appendix C). The jurisdiction of this Court in invoked under 28 U.S.C.§1254.

QUESTIONS PRESENTED

1. Whether the defendant, charged with a misdemeanor for failure to file income tax returns, a violation of 26 U.S.C. 7203, can properly be convicted on evidence that the defendant had failed to pay his taxes for those years, a crime not charged in the information.

2. In the trial of an information charging a violation of law for failure to file income tax returns, is it proper for the government to introduce evidence to show the amount of income taxes due and owing from the defendant, and the fact that he failed to pay such taxes; in effect evidence of a felony charge for evasion of income taxes, not charged in the information?

3. Should a conviction predicated upon evidence of a crime not charged in the information or indictment, introduced under the theory that it is relevant upon the issue of intent, be sustained?

4. It is a violation of due process where the Court charged the jury "ignorance of the law is no excuse", thus diluting the constitutional presumption of innocence by making it obligatory upon the defendant to testify that he did not have the criminal intent required by the statute for the commission of the crime charged.

STATUTES AND RULES INVOLVED

This case involved 26 U.S.C.§7203, the Fifth Amendment to the Constitution of the United States, the Sixth Amendment to the Constitution of the United States and Rule 6 of the Federal Rules of Criminal Procedure.

REASONS FOR GRANTING THE WRIT

The practice of permitting the government to introduce evidence of other crimes than those charged in the indictment or information constitutes a drastic invasion of the proscription that a defendant may not be tried or convicted of a crime not charged by the Grand Jury or not contained in the information.

The maxim "ignorance of the law is no excuse" charged by the Court to the jury must be limited and defined where its application solemnizes the silence of the defendant on the issue of intent and exercises the compulsion forbidden by the Fifth Amendment.

STATEMENT OF THE FACTS

Petitioner, SEYMOUR ROSENFIELD, was charged in an information with violations of Section 26 U.S.C.A.§7203, failure to file income tax returns for the years 1964 through 1967. These offenses are misdemeanors. Petitioner was not charged with failure to pay tax, or tax evasion under 26 U.S.C.§7201, a felony.

Petitioner admitted that he failed to timely file the tax returns. The only issue was whether the failure to file was wilful.

The government, over objection, was permitted to put on the blackboard before the jury evidence that petitioner's income for the year 1964 was $78,000; for the year 1965, $108,000; for the year 1966, $266,000; and for the year 1967, $165,000. The government, over objection, introduced evidence that the tax due on petitioner's income for said years was not paid each year, and remained unpaid at the time of trial.

The government admitted that if petitioner merely filed a return at the proper time containing only his name and social security number, without stating the amount of income, or the amount of tax due, he would have complied with the statute and would not be guilty of failing to file the returns as charged.

Thus the effect of showing the amount of income received by defendant through the four years in question, the tax due thereon, and the fact that the tax had not be paid, exposed petitioner to the probability that the jury as taxpayers would convict petitioner for not paying the tax, not the charge contained in the information. No limiting instructions by the court could correct this overriding prejudicial action.

To meet this damaging evidence, petitioner was obliged to take the stand to show what he did with that income and why he had not, as yet, paid the tax. Petitioner testified that he had owned successful insurance agencies in Chicago, but was induced to move to Philadelphia to take over the operation of the Empire Mutual Insurance Company in Philadelphia. Petitioner built Empire Mutual into a successful insurance company with thousands of policyholders. Thereafter, unbeknownst to petitioner, the cash reserves deposited to comply with Pennsylvania Insurance law requirement were withdrawn and worthless securities were substituted. The Commonwealth of Pennsylvania then closed the company, leaving thousands of policyholders without coverage. The Superior Court of Pennsylvania cleared petitioner of all responsibility for the downfall of Empire Mutual Insurance Company. Petitioner, with a moral obligation for these policyholders, used his income for the years 1964 through 1967 to acquire other mutual companies and place new coverage for such policyholders without charge.

Petitioner testified that he believed that if he could not pay the tax due, he need not file a return, and that he would be subject to a civil penalty and interest for not filing the return, as provided in 26 U.S.C.A.§6651. Petitioner testified also that he did not know that it was a criminal offense under 26 U.S.C.§7203 not to file the return.

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All the evidence about Empire Mutual, petitioner's previous trial and acquittal by the Superior Court of Pennsylvania was necessary when petitioner was obliged to explain why he did not pay his tax. This was not the crime with which he was charged. It was his defense testimony which exposed him to the prejudice that flowed from such testimony, and opened the door to cross-examination of such extraneous matters.

Though petitioner did not file his returns timely for the years 1964 through 1967, he did file them on March 8, 1969, within less than a month after he first learned that it was a criminal offense not to file returns, and before the statute of limitations had run. In 1971 petitioner was tried for tax evasion for the years 1961 and 1962 arising out of the Empire Mutual morass, and was acquitted. The government was aware in 1971 that the petitioner had not filed returns for 1964 through 1967.

At the trial the government was permitted over objection to cross-examine petitioner as to whether his late returns for the years 1964 through 1967 were accurate although this was not a tax evasion case. The innuendo from this cross-examination was highly prejudicial.

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The jury returned with a question asking for a definition of wilfulness. The court replied by charging that 'ignorance of the law is no excuse'. The jury found the petitioner guilty.

The sole issue for the jury was the essential requirement of intent necessary to establish guilt, and proof should have been restricted and limited to this issue.

ARGUMENT

The rule is well established that the government can only prove those offenses charged in the indictment or information, and none other. Otherwise the jury might convict for uncharged offenses. The government was permitted to mark in evidence, over objection, the income tax returns filed late by petitioner for the years in question, and was permitted to show the amount of income that was earned, and that the tax had not been paid on the income revealed on the tax returns. These were matters not charged in the information, were irrelevant, and such evidence was manifestly prejudicial. The government justified this patently prejudicial matter under the guise of offering evidence of wilfulness or bad motive on the part of the defendant.

It is therefore the position of petitioner that irreparable, unconscionable damaging inferences wrongfully pervaded the deliberations of the jury and influenced their verdict.

Petitioner urges that the verdict rendered rested on proof of offenses not charged in the indictment or information. The error is not merely an insignificant variance between allegation and proof and thus harmless error as in Virgill v. United States, 295 U.S. 78. The crime charged here is a misdemeanor and the law requires that prosecution should be begun either by indictment or information. The indictment, once returned, or the information, once filed, may not have its charges amended or broadened at the will of the United States Attorney in the middle of the trial proceedings. To attempt to do so violates basic due process. Were this a felony the United States Attorney would have been precluded from such proof absent a new indictment, Ex parte Bain 121 U.S.1; Stirone v. United States, 361 U.S. 270. It does not lie within the province of a court to change the charging part of the information or indictment for any reason. A person can be tried only on charges made in the indictment or information. See United States v. Norris, 281 U.S. 619,622 and Clyatt v. United States, 197 U.S. 207.

But that is what the court did permit in this case. The original information does not charge evasion of taxes, a separate, distinct and different offense, a felony, under 26 U.S.C.§7201. Nor does the information charge that the taxes were not paid, a specific separate offense set forth in 26 U.S.C.A.§7203.

The case law supports the petitioner's contentions. In Stirone, supra, at p.273, this Court stated:

> "It cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned. Although the trial court did not permit a formal amendment of the indictment, the effect that what it did do was the same. And the addition is neither trivial, useless nor innocuous."

The government under §7203 of the United States Code might have charged inter alia the failure to pay the tax for the years in question - not merely failing to file. Not having done so, the government was prohibited from proving crimes not charged, and was precluded from introducing such evidence for the purpose of influencing the jury. The evidence of non-payment of the substantial taxes dealt the deadly blow. As Stirone, supra, said at p.217:

> "There was a variance between pleading and proof. That variation here destroyed the defendant's substantial right to being tried only on the charges presented in the indictment returned by the grand jury. Deprivation of such basic rights are too far serious to be treated as nothing more than a variance and then dismissed as harmless error."
> (Emphasis supplied)

Petitioner was convicted on a charge... never made against him. This was the fatal error. Cf. Cole v. State of Arkansas, 333 U.S. 196; Jonge v. State of Oregon, 299 U.S. 353.

The Fifth Amendment due process provision and the Sixth Amendment provision that "in all criminal prosecutions the accused shall enjoy the right... to be informed of the nature and cause of the accusation... " have been violated and wrongfully invaded.

In Russell v. United States, 82 S.Ct. 1038 (1962) at p.1047, the court said:

> "In a number of cases the Court has emphasized two of the protections which an indictment is intended to guarantee, reflected by two of the criteria by which the sufficiency of an indictment is to be measured. These criteria are first, whether the indictment 'contains the elements of the offense intended to be charged,' and sufficiently apprises the defendant of what he must be prepared to meet. And secondly, 'In case any other proceedings are taken against him for a similar offense whether the record shows with accuracy to what extent he may plead a formal acquittal or conviction." See Cochran and Sayre v. United States, 157 U.S. 286,290.

In Bartell v. United States, 227 U.S. 427 the Court noted that the indictment there failed to satisfy the first essential criteria by which the sufficiency of the indictment is to be tested, that is that it failed to "sufficiently apprise the defendant of what he must be prepared to meet". Once he has been apprised of it he should have to look no further nor anticipate any

extra or new thing.

WHERE INTENT IS AN ESSENTIAL ELEMENT OF THE CRIME CHARGED, A CHARGE THAT "IGNORANCE OF THE LAW IS NO EXCUSE" DILUTES THE PRESUMPTION OF INNOCENCE

In this case petitioner predicated his defense on innocent motives and lack of criminal intent required to sustain the crime charged. He believed he had to pay the tax when the return was filed. He did not have the money to pay what he owed.

Petitioner testified that he did not know that it could be a criminal offense not to file a tax return. He testified that he had no evil purpose or motive in not filing his return. The court, however, as a matter of law, in effect rejected that defense and the protection that if afforded from the case when it charged the jury:

> "As long as the inexcusable intent is present it is not necessary that the defendant know that his conduct is subject to criminal penalty... that is what is meant by the old saying ignorance of the law is no excuse and it applies in this case."

It is for the jury to say in what mental state petitioner's acts may be circumspect, and the court should not have led the jury from its determination in this respect. Every crime must have an overt act and a mens rea; i.e., evil intent. Here it must be the intent to do a wrongful act for a wrongful purpose or as otherwise

phrased, for an evil purpose or from a bad motive. If the defendant did not know that the criminal laws of the United States required him to file these returns, then obviously he cannot be guilty of the crime charged.

The government has admitted that the defendant could have filed the return with just his name and social security number on it. Does this mean that the government requires the performance of insignificant acts without any purpose or effect? Even when such a complete blind spot exists, with no return of any kind filed, the taxpayer cannot per se, ipso facto, be declared guilty of this crime. The defendant still has the right to explain why he did not file it and if his reason is believed, the jury may find him not guilty. And, inter alia, his ignorance of his duty to file some return even if it only contains his name, address and social security number may be a complete defense.

In Edwards v. United States, 321 F. 2d 324 (1963)(CCA5) a gambler conceded that he had not paid the tax on his business risks. There was no proof however that he was aware of federal tax or that he wilfully refused to pay it. The court stated (p.325):

> "... such proof was indispensable, and accordingly reverse both convictions and direct that the information be dismissed."

"We have long held that, where the statutory definition of the crime of failure to pay a tax includes the element of wilfullness, 'then a specific wrongful intent, that is, actual knowledge of the existence of the obligation and a wrongful intent to evade it, is of the essence."
(Emphasis supplied)

The court incorporated the principle enunciated in Yarborough v. United States, 230 F.2d 56 (4th circuit) in which the following was stated:

"Ignorance of the law is no defense to crime, except that, where wilfulness is an element of the crime, ignorance of a duty imposed by law may negative wilfulness in failure to perform the duty."
(Emphasis supplied)

The court repeated its erroneous charge which negated petitioner's contentions by telling the jury, in effect, that as a matter of law, the defendant was guilty of wilful violation of the statute in failing to file tax returns.

In United States v. Murdock, 290 U.S. 389, the Court stated:

"... the act requires the taxpayer to make the return, to keep the required records and to supply needed information. But Congress did not intend that a person by reason of a bona fide misunderstanding as to his liability for the tax or his duty to make the returns... should become a criminal by his mere failure to measure up to the prescribed standard of conduct. But it is for the jury to say whether such conduct was

prompted by bad faith or evil intent which the statute makes the necessary element of the offense."
(Emphasis supplied)

CONCLUSION

Petitioner has wrongfully been convicted by evidence of the commission of crimes not charged in the information on which he was prosecuted.

The learned Trial Judge confused the legalistics that surround the well known phrase "ignorance of the law is no excuse". The issue was ignorance that led petitioner to fail to file a return. In the particular background of this statute where wilfulness is the necessary ingredient, there is a necessity that there be in the mind of the alleged wrong-doer an accurate knowledge that what he is doing is wrong, or the actual knowledge of what he is required to do under all circumstances without relent or excuse.

Respectfully submitted,

B. NATHANIEL RICHTER, Esq.
Counsel for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1464

UNITED STATES OF AMERICA, *Appellee*

v.

SEYMOUR ROSENFIELD, *Appellant*

(D. C. Criminal No. 71-209)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued October 6, 1972

Before SEITZ, *Chief Judge*, HASTIE and HUNTER, *Circuit Judges*

OPINION OF THE COURT

(Filed November 6, 1972)

PER CURIAM:

A jury found appellant guilty of wilfully failing to file tax returns in violation of 26 U.S.C. §7203. Appellant's defense was that he believed that he did not have to file if he did not have the money to pay the tax, and he did not have the money to pay.

The Government introduced evidence of appellant's income for the years in question. After appellant had testified that he was married, the Government was permitted to cross-examine him to show that he was, in fact, divorced. The Government then devoted a portion of its closing argument to appellant's false statement.

APPENDIX "A"

Appellant presents several arguments to justify a reversal. None of them do, and we will consider them seriatim.

EVIDENCE OF APPELLANT'S INCOME

Appellant contends that it was error to introduce the evidence of the amount of his income because it was evidence of a crime for which he had not been charged, i.e., tax evasion. The jury's verdict may thus have been based on an offense not charged in the indictment and which appellant was not prepared to defend. *Stirone v. United States*, 361 U.S. 270 (1959).

The evidence was properly admitted by the district court. There is no question that the appellant's income was evidence of another crime. The central question, though, is whether it is relevant to an element of the crime charged. Such evidence is very probative as to the element of wilfulness. *United States v. MacLeod*, 436 F.2d 947 (8th Cir. 1971), *cert. denied*, 402 U.S. 907 (1971). The district court admitted that evidence solely as to wilfulness and gave a jury charge to that effect to which appellant did not object.

DIVORCE

Appellant testified on direct examination that he was married. He argues that it was improper for the Government to ask him during cross-examination whether he was divorced.

There is nothing in this argument to justify a reversal. Appellant introduced this matter, and it was certainly proper for the Government to impeach him on it. *See, e.g., Sleek v. J. C. Penney Company*, 324 F.2d 467, 474 (3d Cir. 1963); *Mintz v. Premier Cab Ass'n.*, 127 F.2d 744 (D.C. Cir. 1942); C. T. McCormick, *Handbook of the Law of Evidence* 43 (1954). Its use of appellant's false statement was confined to reasonable limits and was relevant to appellant's credibility.

JURY CHARGE

Appellant claims that the jury charge on the issue of

wilfulness was incorrect because it does not meet the standards set in prior court decisions.[1] *See, e.g., United States v. Murdock*, 290 U.S. 389 (1963); *Edwards v. United States*, 321 F.2d 324 (5th Cir. 1963); *United States v. Palermo*, 259 F.2d 872 (3d Cir. 1957). 10 Mertens, Law of Federal Income Taxation §55A.09 (1958). He particularly objects to that portion of the charge which deals with "ignorance of the law." He argues that the

---

1. The Court gave the following charge:

"The specific intent of wilfulness is an essential element of the crime of failure to file an income tax return. The word 'wilfully' used in connection with this offense means deliberately and intentionally, and without justifiable excuse, or with the wrongful purpose of deliberately intending not to file a return which defendant knew he should have filed, in order to prevent the Government from knowing the extent of his tax liability.

"Defendant's conduct is not wilful if he acted through negligence, inadvertence or mistake, or due to his good faith misunderstanding of the requirements of the law. Even gross negligence is not sufficient to constitute wilfulness. A failure to act is wilful if voluntary and purposeful and with the specific intent to fail to do what the law requires to be done, that is, with the bad purpose to disobey or disregard the law. You, the jury, must decide whether the defendant's failure to file returns was wilful.

"In this case while it is true that the failure to file the returns must be the wilful result of some bad intent, such as an intent to conceal taxable income from the Government or delay the assessment and collection of taxes, specific knowledge that this conduct has in fact been made a criminal offense is not necessary to the offense. As long as the inexcusable intent is present, it is not necessary that the defendant know that his conduct is subject to criminal penalties. This is what is meant by the old saying, 'Ignorance of the law is no excuse,' and it applies in this case.

"This is not to say that the defendant would have committed any crime if he were totally ignorant of the requirement under the tax laws to file a return, and had not so filed, but only that, as long as it appears that the defendant knew of the obligation and failed to file as the result of some bad intent. It is no defense that defendant was not aware of the criminal penalties for his failure to file."

charge was given in such a manner that if the jury had believed his defense, it would not have found him innocent.

After having examined the charge, we conclude that it meets the applicable legal standards.

Ignorance of a crime is no excuse, but ignorance of a duty may be where, as here, wilfulness is an element of the crime. *Yarborough v. United States*, 230 F.2d 56 (4th Cir. 1956). The district court charged:

> "'Wilfully' . . . means . . . with the wrongful purpose of deliberately intending not to file a return *which defendant knew he should have filed* . . ." (emphasis added.)

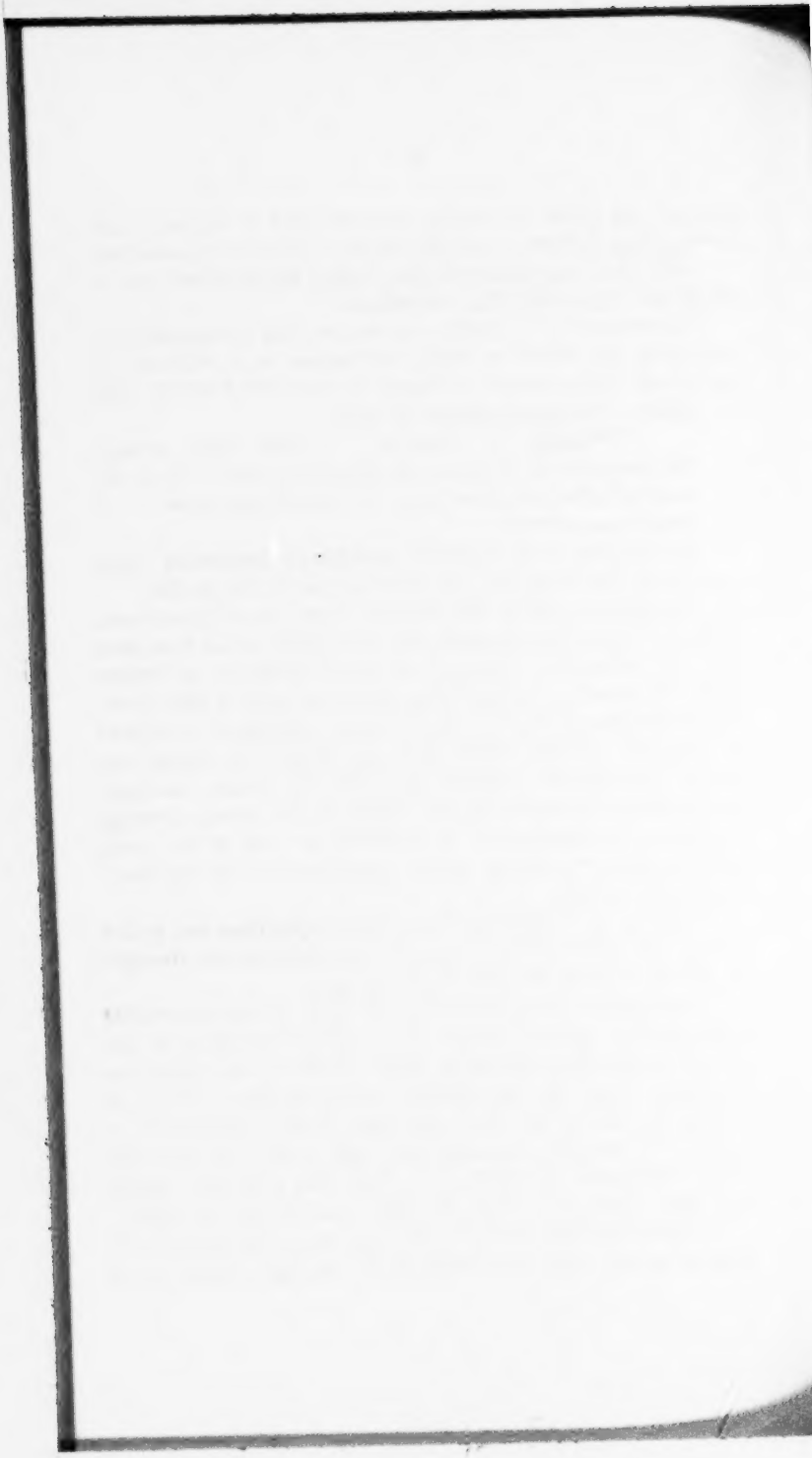
If the jury had believed appellant's testimony, they could have found he did not know he had a duty to file.

Appellant admits the district court would have been correct if it had "instructed the jury that it must first find that the defendant knew of the duty to file on or before April 15, whether or not he paid the tax due at that time, and if they found he was *inadvertent, mistaken, negligent* or *ignorant of the entire duty*, he should be found not guilty." (emphasis added). And yet the court charged: "Defendant's conduct is not wilful if he acted through *negligence, inadvertence* or *mistake*, or *due to his good faith misunderstanding of the requirements of the law.*" (emphasis added).

Clearly the jury could have found appellant not guilty if they had believed him when he testified that he thought he did not have to file if he could not pay.

Appellant's next contention is that it was reversible error for the district court not to relate the facts to the law in its charge to the jury. Such a failure can constitute reversible error in appropriate circumstances. *Choy v. Bouchelle*, 436 F.2d 319 (3d Cir. 1970); *Pritchard v. Liggett & Meyers Tobacco Co.*, 350 F.2d 379 (3d Cir. 1965); *Atkinson v. Roth*, 297 F.2d 570 (3d Cir. 1961); *McNello v. John B. Kelley, Inc.*, 283 F.2d 96 (3d Cir. 1960).

While the district court did not relate the appellant's defense to the legal standards in the charge, it was not in



error. The case was uncomplicated, the only issue was that of wilfulness, and there was little possibility that the jury was unable to understand appellant's defense or to evaluate it with regard to the applicable law. These factors distinguish the present case from those previously cited, all of which were much more complicated. Compare *Choy v. Bouchelle, supra; Pritchard v. Liggett & Meyers Tobacco Co., supra; Atkinson v. Roth, supra,* and *McNello v. John B. Kelley, Inc., supra,* with *Chicago & North Western Railway Company v. Rieger,* 326 F.2d 329 (8th Cir. 1964), *cert. denied,* 377 U.S. 917 (1964);[2] *Cohen v. Western Hotels, Inc.,* 276 F.2d 26 (9th Cir. 1960).

Appellant belatedly filed the returns for the years in question. The Government used the figures on these returns to show the amount of his income. Appellant claims that it was prejudicial for the Government to ask him whether those income tax returns were correct because this suggested that the returns were inaccurate. This argument is without merit.

The judgment of the district court will be affirmed.

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2. "The question is whether the court should have defined the factual situation upon which negligence could have been based. . . . [W]hether a court is required to define the issues may depend on the complexity and the protracted character of the case. There is some discretion in the trial court." Chicago & North Western Railway Company v. Rieger, 326 F.2d 329, 337 (1964), *cert. denied,* 377 U.S. 917 (1964).

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

United States Court of Appeals

For the Third Circuit

No. 72-1464

UNITED STATES OF AMERICA

vs.

SEYMOUR ROSENFIELD, Appellant

(D.C. Criminal No. 71-209)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, Chief Judge and WASTIE and HUNTER, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed April 18, 1972, be, and the same is hereby affirmed.

ATTEST:

Clerk

November 6, 1972

Certified as a true copy and issued in lieu of a formal mandate on December 13, 1972.

THOMAS F. QUINN

Clerk, United States Court of Appeals for the Third Circuit

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APPENDIX "B"

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 72-1464

UNITED STATES OF AMERICA

v.

SEYMOUR ROSENFIELD,

Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge; HASTIE, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN and HUNTER, Circuit Judges

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

James Hunter, III Judge

Dated: December 4, 1972.

APPENDIX "C"